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IN THE

OCTOBER TERM, 1971

NO. 71-218

RALPH GROUNDS, HENRY HITCH, ET AL.
(LANDOWNERS)
Petitioners,
vs.
NORTHERN NATURAL GAS COMPANY, ET AL.
(HELEX GROUP)
and
SOCONY MOBIL OIL CO., INC.
(MOBIL OIL CORPORATION substituted),
ET AL. (LESSEE-PRODUCERS)
Respondents.

On Petition For Certiorari

LANDOWNERS' PETITION FOR REHEARING OF DENIAL OF PETITION FOR CERTIORARI

Grounds For Rehearing

1. For purposes of certiorari the judgment of the Court of Appeals became final only when it was final as to all parties and as to all issues.

2. The filing of timely petitions for rehearing by *some* parties rendered the judgment interlocutory as to *all* parties until the petitions were ruled upon.

Argument

The petition for certiorari was denied as untimely. If that dismissal was based upon a misapprehension of the record, as we believe it was, the case is peculiarly one for

consideration upon petition for rehearing. *Brady v. Terminal R. R. Ass'n.*, 302 U.S. 678, 688; *Bakery & Pastry Drivers v. Wohl,* 315 U.S. 769, 773; *Cafeteria Employees Union v. Angelos,* 319 U.S. 753, 778.

In the trial court six interpleader cases and two suits against the United States under the Tucker Act and the Tort Claims Act were consolidated for trial. Landowners were parties in all eight cases. The United States was not a party to the interpleader cases. Judgment was rendered in favor of the helex group in the interpleader cases and in favor of the United States in the other two cases.

In the Court of Appeals the appeals were consolidated for all purposes with a single caption and elaborate time rules for filing a single consolidated brief were prescribed. (Order Directing Procedure, A. 9)

As construed by all the parties the cited order created a single case with multiple issues to which all parties in the consolidated cases became parties.

The understanding of the United States of the effect of the order is shown by its brief in the Court of Appeals. In that brief was presented an argument under the heading "Section 11 Of The Helium Act Amendments Of 1960 Does Not Abrogate The Gas Sales Contracts Insofar As Conveyance Of Or Payment For Helium Is Concerned." The opening sentence under that heading reads, "This issue relates primarily to the interpleader actions in which the lessee-producers are parties and the United States is not but, as already noted, the United States may be affected by the outcome of those cases." (A. 13-20)

In the Court of Appeals, Mr. Floyd France, counsel for the United States in that court and in this court, made an oral argument upon that issue, although, apart from the consolidation into a single case, the issue was not involved in the two cases to which the United States was a party. (Transcript of oral argument of Floyd France, Esq. before Court of Appeals, A. 20-24)

The Court of Appeals decided that issue in favor of lessee-producers and against the contention of the United States. The United States filed a petition for rehearing on that issue, (A. 25-28), which was considered by the Court of Appeals along with petitions for rehearing by other members of the helex group. All were overruled on May 20, 1971. (App. to Petition for Certiorari p. 186) Landowners filed their petition for certiorari on August 16, 1971.

In this court the United States filed a memorandum in support of petitions for certiorari in *Northern Natural Gas Company, et al. v. Mobil Oil Corporation, et al.*, No. 71-238 and *Panhandle Eastern Pipe Line Company, et al. v. Mobil Oil Corporation, et al.*, No. 71-243. Except for the consolidation into a single case in the Court of Appeals, the United States would not have been a party in either case.

The petition for certiorari in the case at bar seeks review of the same judgment as the cases mentioned in the preceding paragraph. *It was filed before either of them were filed.*

The filing in the Court of Appeals of timely petitions for rehearing by the United States and by the helex com-

panies rendered the judgment of the Court of Appeals interlocutory. *United States v. Healy,* 376 U.S. 75, 11 L.ed.2d 527; *United States v. Adams,* 383 U.S. 39, 41, f.n.1, 15 L.ed.2d 572, 574, 86 S.Ct. 708.

It has been the rule of this court since its earliest days that a judgment is not final until it is final as to all parties and as to all issues. *United States v. Girault,* 52 U.S. (11 How.) 22, 13 L.ed. 587; *Meagher v. Minnesota Thresher Manufacturing Company,* 145 U.S. 608, 36 L. ed. 834; *Hohorst v. Hamburg-American Packet Company,* 148 U.S. 262, 37 L.ed. 443; *National Bank of Rondout v. Smith,* 156 U.S. 330, 39 L.ed. 441; *Collins v. Miller,* 252 U.S. 364, 64 L.ed. 616; *United States v. Crescent Amusement Co.,* 323 U.S. 173, 89 L.ed. 160; *Andrews v. United States,* 373 U.S. 334, 10 L.ed.2d 383.

The reason for the rule is stated in *Collins v. Miller,* 252 U.S. 364, 370, 64 L.ed. 616, 618 as follows:

> "* * A case may not be brought here by appeal or writ of error in fragments. To be appealable the judgment must be not only final, but complete. [Citing cases.] And the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved. [Citing cases.] The seeming exception to this rule by which an adjudication final in its nature, of matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final, so as to authorize an appeal without awaiting the termination of the general litigation below [Citing cases], has no application here. * * *

> Here a single judgment deals with the detention on three affidavits. Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court."

Landowners were indispensable parties to every one of the eighty-eight consolidated appeals. Certainly neither the helex companies nor the United States could have sought review of the judgment of the Court of Appeals during the pendency of their petitions for rehearing. Since they could not, landowners could not. A judgment becomes final as to all parties at one and the same time. Petition for certiorari by landowners prior to disposition of the petitions for rehearing filed by the helex companies and by the United States would have sliced off and placed in this court only a portion of the controversy, a procedure which has been disapproved throughout the history of the court.

In *United States v. Crescent Amusement Co.*, 323 U.S. 173, 177, 89 L.ed. 160, 165, the trial court rendered a final judgment. Plaintiff United States appealed on the sixtieth day thereafter. On that date timely motions by certain defendants to amend the findings were pending. Those motions had nothing whatever to do with the portion of the judgment about which the United States complained. Nevertheless it was held that the appeal by the United States was premature and it was dismissed. A subsequent appeal perfected within sixty days after the date the motions were overruled was held to be timely.

A red herring has been injected into the case by some of the respondents. In the Court of Appeals landowners filed a motion for leave to file a petition for rehearing out

of time to bring before the court a decision of the Supreme Court of Oklahoma rendered subsequent to the decision by the Court of Appeals. That motion was denied.

Landowners did not in their petition for certiorari and do not now rely upon that motion to extend the time for filing petition for certiorari. Landowners rely upon the fact that the judgment became final as to all parties and all issues on the date the petitions for rehearing were denied. Landowners' petition for certiorari was filed within ninety days after that date.

Conclusion

Landowners pray that the order denying landowners' petition for certiorari as out of time be set aside, that the petition be considered on its merits and the writ granted.

Respectfully submitted,

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PETITIONERS

CERTIFICATE OF COUNSEL

The undersigned counsel for petitioners does hereby certify, pursuant to Rule 56 § 2, that this petition for rehearing is presented in good faith and not for purposes of delay and that the matters presented herein relate to issues which arose subsequent to the filing of the petition for certiorari.

DALE M. STUCKY

APPENDIX

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SEPTEMBER TERM, SEPTEMBER 10, 1969

Before Honorable Alfred P. Murrah, Chief Judge

Northern Natural Gas Company, et al (Helex Group) *Appellees and Cross-Appellants* vs. Ralph Grounds, Henry Hitch, et al (Landowners) *Appellants and Cross-Appellees,* and Socony Mobil Oil Co., Inc. (Mobil Oil Corporation substituted) et al. (Lessee-Producers) *Appellants and Cross-Appellees.*	307-69, 308-69, 309-69, 310-69, 311-69, 312-69, 313-69, 314-69, 315-69, 316-69, 317-69, 318-69, 319-69, 320-69, 321-69, 322-69, 361-69, 362-69, 363-69, 364-69, 365-69, 366-69, 367-69, 368-69, 369-69, 370-69, 371-69, 372-69, 373-69, 374-69, 375-69, 376-69, 377-69, 378-69, 379-69, 380-69, 381-69, 382-69, 383-69, 384-69, 385-69, 386-69, 387-69, 388-69, 389-69, 390-69, 391-69, 392-69, 393-69, 394-69, 395-69, 396-69, 397-69, 398-69, 399-69, 400-69, 401-69, 402-69, 403-69.

ORDER DIRECTING PROCEDURE

On stipulation of all parties, it is ORDERED:

First: All present and future appeals from the judgment of the United States District Court in the consolidated cases entitled Northern Natural Gas Company, et al. v. Ralph Grounds, Henry Hitch, et. al., Civil Action No.

KC-1969 and Consolidated Civil Actions, Nos. KC-1945, KC-1946, KC-1947, KC-1948, KC-1980, W-3009 and W-3159 are consolidated for hearing in this court.

Second: The consolidated cases shall bear the title stated in the caption of this order.

Third: All pending motions and proposed orders are withdrawn.

Fourth: The time for transmitting the record or documents in lieu thereof and for docketing the appeals is extended to September 28, 1969.

Fifth: No docketing statement shall be required and the appeals are assigned to the general calendar.

Sixth: Typewritten briefs of appellant landowners and lessee-producers shall be served within forty-five days after the record or documents in lieu thereof is transmitted and the clerk so notifies all parties. Designations of contents of appendix shall be served at the same time.

Seventh: Typewritten briefs of the Helex group (Pipe Line Companies, Helex Extraction Companies, and United States of America) shall be served within sixty days after service of the later served brief of landowners and lessee-producers. Designation of contents of appendix shall be served at the same time.

Eighth: Typewritten reply briefs of landowners and lessee-producers and answers to briefs of appellant Pipe Line Companies and Helex Extraction Companies shall be served within sixty days after service of Helex group briefs.

Ninth: Typewritten reply briefs of appellant Helex group shall be served within thirty days after service of the later filed answer brief of landowners and lessee-producers.

Tenth: Original briefs of landowners and lessee-producers shall not exceed 150 printed pages. Original briefs of Helex group shall not exceed 200 pages. Reply briefs by all parties shall not exceed fifty pages.

Eleventh: All parties shall be entitled to designate supplements to the appendix within fifteen days after service of the last brief provided for herein. Within thirty days after service of the last brief provided for herein, a composite designation of the appendix, including all prior supplemental designations, will be filed by landowners.

Twelfth: All appellants elect not to have the appendix printed under the direction of the clerk, but landowners and lessee-producers assume in equal shares the payment to the clerk of the sum of $250 for the assistance of the clerk in the preparation of the appendix, such payment to be taxed as costs.

Thirteenth: Landowners and lessee-producers shall be allowed sixty days after final designations of the appendix within which to print it. Forty extra copies of the appendix shall be printed.

Fourteenth: It shall be unnecessary to include the pleadings in the appendix, relevant portions of the pretrial order being sufficient. Any party may designate portions of the pleadings for inclusion in the appendix, but such designations shall be kept to a minimum.

Fifteenth: Printed briefs shall be served within thirty days after receipt of the printed appendix.

Sixteenth: The record shall remain in the office of the clerk of the district court.

Seventeenth: All parties shall co-operate in furnishing the clerk of the district court with an index to exhibits.

Eighteenth: The appeals will be set for argument at the September, 1970, session in Wichita, Kansas, unless the court otherwise directs.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NORTHERN NATURAL GAS COMPANY, et al. (Helex Group),
Appellees and Cross-Appellants

v.

RALPH GROUNDS, HENRY HITCH, et al. (Landowners),
Appellants and Cross-Appellees

and

SOCONY MOBIL OIL CO., INC. (MOBIL OIL CORPORATION substituted) et al. (Lessee-Producers),
Appellants and Cross-Appellees

307-69, 308-69, 309-69, 310-69, 311-69, 312-69, 313-69, 314-69, 315-69, 316-69, 317-69, 318-69, 319-69, 320-69, 321-69, 322-69, 361-69, 362-69, 363-69, 364-69, 365-69, 366-69, 367-69, 368-69, 369-69, 370-69, 371-69, 372-69, 373-69, 374-69, 375-69, 376-69, 377-69, 378-69, 379-69, 380-69, 381-69, 382-69, 383-69, 384-69, 385-69, 386-69, 387-69, 388-69, 389-69, 390-69, 391-69, 392-69, 393-69, 394-69, 395-69, 396-69, 397-69, 398-69, 399-69, 400-69, 401-69, 402-69, 403-69, 486-69, 487-69, 488-69, 489-69, 490-69, 491-69, 492-69, 493-69, 494-69, 495-69, 496-69, 497-69, 498-69, 499-69, 500-69, 501-69, 502-69, 503-69, 504-69, 505-69, 506-69, 507-69, 508-69, 509-69, 510-69, 511-69, 512-69, 513-69, 514-69, 515-69.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF FOR THE UNITED STATES, APPELLEE

[p. 34]

II

SECTION 11 OF THE HELIUM ACT AMENDMENTS OF 1960 DOES NOT ABROGATE THE GAS SALES CONTRACTS INSOFAR AS CONVEYANCE OF OR PAYMENT FOR HELIUM IS CONCERNED.

This issue relates primarily to the interpleader actions in which the lessee-producers are parties and the United States [p. 35] is not but, as already noted, the United States may be affected by the outcome of those cases. This is particularly so in view of the position taken by the lessee-producers on this appeal.

In the court below, the lessee-producers claimed that the leases conveyed title to the helium constituent of the gas but that the gas sales contracts did not. Apparently, they have not urged either point in this Court but argue that by reason of Section 11 of the Helium Act Amendments of 1960, 50 U.S.C. sec. 167i, the gas sales contracts are abrogated insofar as they embrace payment for the helium constituent of the natural gas stream sold. They then ask this Court to award them as a separate additional payment the value of the helium constituent of the gas sold and delivered under the contracts. It is not clear whether they contend that this results in a title failure. If the Court holds that it does, then the provisions of the contracts between the United States and the Helex Companies relating to title failure might come into play.

The argument of the lessee-producers completely ignores the purposes of Section 11 of the Helium Act Amend-

ments of 1960. As already noted, that Section has two principal objectives. First, Congress desired to preserve the arrangement under which the Bureau of Mines has been responsible for helium production. It likewise desired to continue without interference from the [p. 36] Bureau of Mines, the regulation of the natural gas industry by the Federal Power Commission as it had done since the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. secs. 717-717W.

The second purpose to be accomplished by Congress in Section 11 was to provide that revenues from the sale of helium shall not be used by the Federal Power Commission, and certain costs shall be excluded, in determining rates of a natural gas company. These purposes are abundantly clear from the wording of Section 11 and also from the legislative history which is discussed at length in the memorandum opinion of the court below, pp. 106-113, and in the brief of the Helex Group. Historically, the Department of the Interior, acting through the Bureau of Mines, has been the agency upon which Congress has conferred the duty of making helium available for essential uses, including conservation for future needs, Acts of March 3, 1925, 43 Stat. 1110, September 1, 1937, 50 Stat. 886, and September 13, 1960, 74 Stat. 918. Likewise, the Federal Power Commission has been charged by Congress with the responsibility for the regulation of the transportation and sale of gas in interstate commerce for resale.

The Department of the Interior has carried out its functions without experiencing any difficulties arising out of the exercise by the Federal Power Commission of its

[p. 37] jurisdiction over natural gas under the Natural Gas Act. The Federal Power Commission has exercised its jurisdiction under the Natural Gas Act without interference from any of the helium activities of the Department of the Interior (Wheeler, R. Vol. 66: 6342-6344; App. 887-9). This has never required the Commission to deal with less than the entire gas stream. The Commission's jurisdiction, of course, does not extend to certain constituents of a gas stream, such as sulphur compounds, when considered *as a separate commodity.*

By Section 11 of the Helium Act Amendments of 1960, Congress clearly continued the pre-existing situation under which the Department of the Interior administered the Government's helium program and the Federal Power Commission regulated, to the extent directed by Congress, the natural gas industry. This is the thrust of the opinion of the Court of Appeals for the Eighth Circuit in *Panhandle Eastern Pipeline Co. v. F.P.C.,* 359 F.2d 675 (C.A. 8, 1966). That opinion clearly upholds the jurisdiction of the Federal Power Commission over the entire gas stream, even though it may contain helium in a significant amount which is being or may be treated for helium extraction. The Eighth Circuit found such jurisdiction necessary for the Federal Power Commission to carry out the responsibilities conferred upon it by Congress. The Eighth Circuit points out that the legislative history fully supports its view.

[p. 38] The second purpose of the Section also is important from the standpoint of the United States. Representatives of the Department of the Interior objected before

Congressional committees to revenues of sales from helium to the United States being used for the purpose of reducing rates on natural gas sold to fuel or other consumers. This, of course, would have made it more difficult for the Department of the Interior to contract with private industry since it was anticipated the helium extraction companies would not be satisfied with a public utility rate of return (Wheeler, R. Vol. 66:6336; App. 887). At the same time, representatives of the Federal Power Commission objected to the original wording of the legislation on the ground that it would eliminate from Federal Power Commission jurisdiction gas containing helium in significant amounts. The proposed legislation was amended to take care of the objections. The Senate Committee on Interior and Insular Affairs, S. Rept. No. 1814, 86th Cong., p. 5, R. Vol. 183, Hel. 281 Jt.; App. 2111, states that the revised Section 11 "makes it clear that the Federal Power Commission retains jurisdiction over natural gas containing helium but has no jurisdiction over helium itself." Thus, the Committee clearly understood that the Federal Power Commission was to have "no jurisdiction over helium itself" as a separate commodity but that it "retains jurisdiction over natural gas containing helium." [p. 39] As the Eighth Circuit pointed out in the *Panhandle* decision, this must mean that the Federal Power Commission retains jurisdiction over the whole gas stream if it is to carry out the responsibility entrusted to it by Congress. For the reasons stated, it is the Government's position[3/] that the Federal Power Commis-

3/ Undersigned counsel do not purport to represent the Federal Power Commission. But see the position taken by F.P.C. and sustained in *Panhandle Eastern Pipeline Co.* v. *F.P.C.*, 359 F.2d 675 (C.A. 8, 1966).

sion rate schedules apply to the entire gas stream subject only to the exclusion of nonjurisdictional constituents such as sulphur and helium when dealt with *as separate commodities.*

The lessee-producers contend that Section 11 abrogated their gas sales contracts at least to the extent of making the prices paid for gas sold to pipelines applicable only to combustibles, or at least not applicable to the helium. There is absolutely nothing in the legislative history indicating an intent on the part of Congress to abrogate any contracts and the lessee-producers have pointed out none. The partial abrogation of the contracts is in no way essential or beneficial to the [**p. 40**] helium conservation program and there is no reason why Congress should have been interested in this question which at that time was entirely between the lessee-producers and the pipelines. The contracts between the Helex Companies and the United States did not come into existence until several years later. The interpretation urged by the lessee-producers, if it had been included in Section 11, would only have made it more difficult and costly for the Government to negotiate the contracts necessary to carry out the helium conservation program.

The lessee-producers also fail to point out that their interpretation of Section 11 would give them an increase in price, but without action by the Commission, for that portion of the stream which they allege remained subject to F.P.C. jurisdiction. There seems to be no question but that prior to September 13, 1960, the prices stated in the

gas sales contracts or the rates established by the F.P.C. covered the entire stream. The lessee-producers say that, subsequent to that date, those prices or rates cover something less than the entire stream. But they continued to receive the same price based upon the total volume delivered. There was no reduction in price or in volume due to the alleged partial abrogation of the contracts eliminating helium (and possibly other noncombustibles). They point to [p. 41] nothing in Section 11 or in the legislative history showing Congress intended such a windfall, completely apart from what they may or may not receive for the helium, which would result if their interpretation is adopted. An intention should not be lightly imputed to Congress to effect a rate increase for natural gas without sanction of the Federal Power Commission.

CONCLUSION

For the foregoing reasons, as well as those stated in the memorandum findings of fact and conclusions of law of the court below and the brief of the Helex Group, the judgment of the District Court should be affirmed insofar as:

a. It holds that oil and gas leases convey title to the helium and dismisses the landowners' claims against the United States on the merits;

b. It holds that the defendant, the United States, take nothing on its claims against the third party defendants in the government actions; and

c. It holds that neither the landowners nor the lessee-

producers have a valid claim to title or additional compensation for the helium constituent of the natural gas processed for helium extraction by the Helium Companies and sold to the United States [p. 42] under the four contracts between the Helex Companies and the United States.

Transcript of Oral Argument of Floyd France on Behalf of United States in Court of Appeals

[p. 197] MR. FRANCE: May it please the Court, the contentions made now by the lessee-producers raise a question of statutory construction. As usual, in determining questions of statutory construction the controlling factor is the intent of Congress. Here the intent of Congress, we submit, is readily available, both from the Act itself — the 1960 Act itself — and from the legislative history. Prior to the enactment of the 1960 Act, the primary purpose of the Federal helium program was to furnish helium for current uses of the Government and of industry.

The increasing demands for helium during the 1950's demonstrated a need for a conservation program. The resources were being wasted and not used, and so in order to meet this need for future anticipated need for helium, Congress passed the 1960 Act, the Helium Act Amendments of 1960, which authorized a large scale long-range helium conservation program. Actually, it is rather a simple program. Under it the Government purchases crude helium, extracted from the gas stream in pipelines going from the Hugoton field, and it is stored in an underground reservoir until needed at some time in the future.

This gas is produced under the oil and gas leases by the lessee-producers, and by the lessee-producers [p. 198] it is sold and delivered to the pipeline companies under gas sales contracts which are and for some time have been subject to regulation by the Federal Power Commission. Each of these contracts contains a warranty of title and I believe one of the features of the contracts which remains effective, notwithstanding FPC regulation, is the warranty of title provisions. The contracts prior to 1960 clearly covered the entire gas stream, including the inerts such as nitrogen and helium, and the warranty of title extended to all of these constitutents.

The question now before this Court, therefore, is whether Congress in 1960 intended to interfere with or abrogate in any way the contractual arrangements then existing between the lessee-producers and the pipeline companies in those particular instances where the pipeline companies or their subsidiary companies extracted the helium and sold it to the United States.

Now, the purpose of the 1960 Act was clearly conservation of helium and it was not necessary in order to obtain this conservation of helium for Congress to interfere in any way with the existing contractual relationship between the lessee-producers and the pipelines. The fact is that if that existing contractual relationship is interfered with, it will not help the conservation program. It will [p. 199] only interfere with it, make it more difficult for the Bureau of Mines to carry out that program and make the program more expensive. Certainly, Congress did not intend this result when it enacted the 1960 Act.

Now, that is looking at the Act as a whole, at its general purpose to conserve helium. The lessee-producers rely particularly upon Section 11, and so we will take a further look at the purposes of Section 11. Now, prior to this time the Federal Power Commission had followed the practice of taking profits from non-jurisdictional activities of the pipeline companies, taking those profits into consideration when it fixed the rates of the pipeline companies or of the producers. If the Federal Power Commission were to do the same with respect to the sale of helium to the United States, it would make it more difficult for the Bureau of Mines to contract, to negotiate contracts with the helium companies; if the helium companies could retain the profits they would be much more eager to enter into it than it would be if the profits were going to be used for rate-making purposes.

So when Congress enacted Section 11, it provided that profits from the sale of helium as a separate commodity, and also certain joint costs, should not be taken into consideration by the Federal Power Commission in fixing [p. 200] rates for gas.

The second purpose of Section 11 was to continue the historic separation of duties between the Federal Power Commission and the Bureau of Mines. The Federal Power Commission for many years had been the Government agency responsible for the regulation of the natural gas industry. The Bureau of Mines for an even longer period had been the Government agency responsible for the production of helium to meet the demands of both the Gov-

ernment and private industry. Obviously, Congress desired to continue this separation of powers, desired that the Federal Power Commission continue its supervision or regulation of the natural gas industry, continue the Bureau of Mines to have the responsibility for the helium production program and also for the new helium conservation program.

Now, again, it was not necessary at all for Congress to interfere in any way with the contractual relationship theretofore existing between the lessee-producers and the pipeline companies in order to put into effect these two purposes of Section 11 of the Helium Act Amendments. Again, if Congress had interfered in any way with the contractual relationship it wouldn't help but it would hinder the helium conservation program. The Act itself gives no indication whatever that Congress intended any interference [**p. 201**] whatever with the contractual relationship.

The legislative history is even more clear as discussed by Mr. Blaes and by Mr. Richardson, and I may say that the Government supports fully the statements made by Mr. Blaes and Mr. Richardson and I will not repeat any of them. However, as pointed out by them, as pointed out by the court below and as pointed out in the briefs, the legislative history is very clear as to the intent of Congress. Congress intended the Federal Power Commission continue its regulation of helium-bearing natural gas the same as it had done before.

The fact that the Helium Act Amendments, or Section 11 in particular, might in any way whatever interfere with the contractual relationship existing between the lessee-

producers and the pipeline companies is not mentioned in the 1960 Act and that possiblity is not even mentioned in the legislative history. In other words, the particular contentions that are being made by the lessee-producers here were never presented to Congress, they were never considered by Congress, and were never acted on by Congress. The intent of Congress was simply the conservation of helium and the preservation of the historic separation of powers between the two Government bureaus: the Federal Power Commission and the Bureau of Mines. That can be accomplished [**p. 202**] without any abrogation of the contracts.

Now, the court below has considered this and the Court found that if the lessee-producers' claims are to be allowed that would amount to a partial abrogation of the existing contracts. The trial court considered these questions very carefully, they are discussed in the trial court's opinion, and I respectfully submit the trial court's findings in this connection should be affirmed in every respect.

Thank you.

JUDGE BREITENSTEIN: Thank you, Mr. France.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 307-69, etc.
NORTHERN NATURAL GAS COMPANY, et al.,
(Helex Group)
Appellees and Cross-Appellants
v.
RALPH GROUNDS, HENRY HITCH, et al.,
Appellants and Cross-Appellees
and
SOCONY MOBIL OIL CO., INC. (Mobil Oil Corporation substituted), et al.,
(Lessee-Producers)
Appellants and Cross-Appellees

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PETITION FOR REHEARING
OF THE UNITED STATES

The United States of America, appellee, presents this petition for rehearing. In support thereof, the United States adopts, insofar as applicable to it, the reasons set forth in support of the petitions for rehearing being filed by Panhandle Eastern Pipe Line Company and National Helium Corporation and by the Cities Service Companies and the Northern Companies. The United States specifically sets forth and emphasizes the following points:

I

It is submitted that, after determining that the gas sales contracts are not abrogated, this Court committed error in determining that the Federal Power Commission (F.P.C.) price superseded the contract price as to the helium constituent and that the lessee-producers are entitled to the reasonable value of the helium where the gas is processed. The point is whether in these circumstances, the lessee-producers are entitled to the contract price or the reasonable value of the helium.

The basis on which this Court finds the lessee-producers are entitled to any additional payment (they have already received either the contract price or the F.P.C. price for the full volume of gas delivered including the helium) is its finding that under the Helium Act Amendments of 1960, the F.P.C. jurisdiction does not extend to the helium constituent. If F.P.C. jurisdiction does not extend to the helium constituent (a conclusion with which we disagree), then the F.P.C. price cannot supersede the contract price as to the helium constituent. It is plainly contradictory for the Court to find that the helium is not subject to F.P.C. jurisdiction, but that the contract price is superseded in some fashion by F.P.C. regulation. As set forth in the Helex Companies' brief, the holding that the Helium Act Amendments of 1960 and F.P.C. regulation in some manner vitiated the price provisions of the gas sales contracts in a manner not necessary to the purposes of the Natural Gas Act of 1938, as amended, raises serious constitutional problems.

II

The holding of the Court is too broad in requiring that the Helex and Pipe Line Companies pay the lessee-producers the reasonable value of the helium constituent of all gas delivered and processed. The holding is based to some extent, and presumably entirely, on the effect of F.P.C. regulation of the natural gas industry. If so, the holding must be limited to the extent that the industry is subject to F.P.C. regulation. This would require elimination from the Court's holding of gas purchased and processed under the following conditions:

A. All gas delivered under sales contracts where the contract price does not exceed the F.P.C. price since in those cases it cannot be found that the F.P.C. price supersedes the contract price.

B. All situations where there is no gas sales contract subject to F.P.C. regulation. This would include the situation where the Pipe Line or Helex Company is the producer, and also all gas sold and delivered after March 18, 1971, by small producers exempted from F.P.C. regulation by F.P.C. Order No. 428 dated March 18, 1971, Docket No. R-393.[1/]

There may be other situations which would require special attention.

1/ If H.R. 2513, 92nd Cong., 1st sess., exempting small sales of gas from F.P.C. regulations should become law, it would require another exemption.

CONCLUSION

For the foregoing reasons, this petition for rehearing should be granted.

Respectfully submitted,

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